

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS ENRIQUE BELTRAN a/k/a LUIS
ENRIQUE BELTRAN,

Defendant-Appellant.

UNPUBLISHED

August 21, 1998

No. 183454

Wayne Circuit Court

LC No. 94-009373

AFTER REMAND

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,*JJ.

PER CURIAM.

Following a bench trial, defendant was convicted on January 4, 1995, of unarmed robbery, MCL 750.530; MSA 28.798, and habitual offender second, MCL 769.10; MSA 28.1082. Defendant was sentenced to five to fifteen years' imprisonment. The sentence was then vacated and defendant was sentenced to five to twenty-two and one-half years as a habitual offender. Defendant appealed the trial court's sentencing as to the habitual offender charge on the grounds that the prosecution failed to abide by a plea agreement with defendant in an unrelated case whereby the habitual offender charge would be dismissed pursuant to defendant's guilty plea to a misdemeanor for the charge of aggravated stalking.¹ In an unpublished per curiam opinion, issued on January 14, 1997, we remanded to the trial court for an evidentiary hearing on defendant's claim that the prosecution failed to honor its plea agreement. We retained jurisdiction.

On May 22, 1997, the prosecution filed an application for leave to appeal to the Supreme Court. On October 13, 1997, leave to appeal was denied. *People v Beltran*, 456 Mich 877 (1997). On November 26, 1997, the evidentiary hearing was held in the trial court. On March 6, 1998, the trial court issued an order denying defendant's motion to vacate the habitual offender sentence. On April 2, 1998, the trial court denied defendant's motion for reconsideration. We affirm.

* Circuit judge, sitting on the Court of Appeals by assignment.

While Michigan law has yet to address the standard of review of a court's ruling on whether a defendant is entitled to specific performance of an unfulfilled plea agreement, *People v Hannold*, 217 Mich App 382, 388-389; 551 NW2d 710 (1996) holds that a clearly erroneous standard applies when a defendant has failed to comply with a plea agreement. Therefore, we believe the same standard should logically apply when the prosecution fails to comply with a plea agreement.

Where a guilty plea is induced by the prosecutor's promise of leniency, and that promise goes unfulfilled, courts will not let the plea bargain go unfulfilled. *People v Hall*, 399 Mich 288, 290; 249 NW2d 62 (1976). Once a plea is accepted by the trial court, the terms of the agreement must be fulfilled. *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971). When the agreement is subsequently not kept, this Court has the discretion to choose between vacating the plea or ordering specific performance, with the defendant's choice of remedy accorded considerable weight. *People v Peters*, 128 Mich App 292, 295-296; 340 NW2d 317 (1983). When an allegation is made that a promise in a plea agreement remains unfulfilled, the factual record must support the allegation. *People v Davis*, 74 Mich App 624, 626; 254 NW2d 335 (1977).

At the evidentiary hearing, defendant testified that when he was arraigned on the aggravated stalking charge, he was informed that he was being charged as an habitual offender. At that time, defendant had an unarmed robbery charge pending in the same court. Defendant testified that he believed the habitual offender charge applied to both charges. Defendant asserted that his attorney informed him that if he pled guilty to a misdemeanor for the stalking charge and waived his right to a jury trial for the robbery charge, the habitual offender violation would be dismissed for both the aggravated stalking and the unarmed robbery charges. During sentencing for the guilty plea on the aggravated stalking charge, the trial court dismissed the habitual offender charge.

The prosecution has produced two separate settlement offers for each pending case. The pretrial settlement offer for the aggravated stalking charge, signed by defendant and his counsel, specifically references the dismissal of the habitual offender charge. The final settlement offer, included in the pretrial conference summary, for the unarmed robbery charge states that the prosecution intended to pursue both the unarmed robbery and the habitual offender charge. Defendant and his counsel signed the pretrial conference summary.

At defendant's waiver of trial hearing for the unarmed robbery charge, the prosecution made its final offer of the dismissal of the habitual offender charge in return for defendant's guilty plea to unarmed robbery and a waiver of his right to appeal. Defendant, with counsel present, rejected the offer and waived his right to a jury trial. Defendant admitted that no promises of leniency or anything else were made to him in exchange for his decision to waive his right to a jury trial.

At the close of the waiver trial, after the trial court found defendant guilty of unarmed robbery, the prosecution addressed the habitual offender charge. Defendant did not inquire into the supposed dismissal of the charge. During sentencing, neither defendant nor his counsel brought to the attention of the trial court the supposed dismissal of the habitual offender charge.

In reviewing all of the factual findings made at the evidentiary hearing and the entire trial record, we find that the record does not support defendant's claim that the habitual offender charge in the unarmed robbery case should have been dismissed based on the plea agreement relating to the aggravated stalking case. The record is clear that defendant was charged with two distinct and separate crimes each involving an habitual offender charge. While defendant successfully bargained for the dismissal of the habitual offender charge in the aggravated stalking case, defendant failed to bargain for the dismissal of the habitual offender charge in the unarmed robbery case.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ John R. Weber*

¹ MCL 750.411i; MSA 28.643(9).